United States Department of Agriculture,

OFFICE OF THE SECRETARY.

BEFORE THE HONORABLE THE ATTORNEY-GENERAL OF THE UNITED STATES

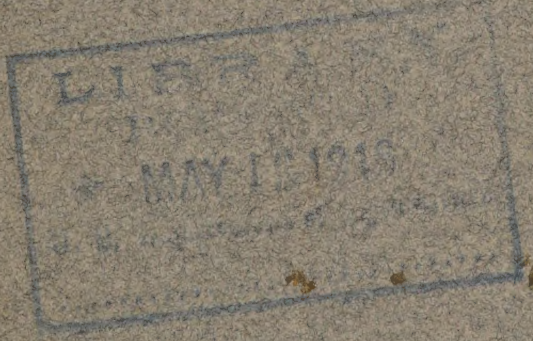
RE

LABELING OF CANADIAN CLUB WHISKY UNDER THE FOOD AND DRUGS ACT OF JUNE 30, 1906.

QUESTION SUBMITTED BY THE SECRETARY OF AGRICULTURE.

BRIEF OF THE SOLICITOR.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1910



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THE QUESTION.

IS "CANADIAN CLUB WHISKY" SUCH A DISTINCTIVE NAME, UNDER THE PROVISIONS OF SECTION 8, PARAGRAPHS 10 AND 11, OF THE FOOD AND DRUGS ACT OF JUNE 30, 1906 (34 STAT., 768), AS TO RELIEVE A MIXTURE OF TWO SEPARATE AND DISTINCT DISTILLATES OF GRAIN FROM THE REQUIREMENT OF BEING LABELED A BLEND OF WHISKIES UNDER SECTION 8, PARAGRAPH 12, OF THE SAME ACT?

The opinion of the Attorney-General on this question is requested by the Secretary of Agriculture under authority of section 356, R. S., which provides that the head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department. This brief of the Solicitor of the Department of Agriculture is submitted in accordance with the direction of the Attorney-General.

THE FACTS.

"Canadian Club Whisky" is a mixture of grain distillates, duly aged after mixing, without further admixture, and reaches the consumer at 90 degrees proof. It is a particular kind and brand of whiskies made by Hiram Walker & Sons (Limited), at Walker-

ville, Ontario, and is now, and has been for years, known and sold under the name "Canadian Club Whisky." It is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. The Department of Agriculture claims that the product is required to be labeled "A Blend of Whiskies," under the law as interpreted in Food Inspection Decision 113. The distillers contend that "Canadian Club Whisky," under section 8 of the Food and Drugs Act, is such a distinctive name as is there described, and, therefore, that the product is not required to be labeled as a blend. A brief in support of this position of the distillers is filed by William Robins, attorney in fact, and Joseph H. Choate and Alfred Lucking, of counsel.

The distillers concede that if the name "Canadian Club Whisky" is not such a distinctive name, the mixture is required to be labeled a blend.

THE LAW.

That part of section 3 of the Food and Drugs Act authorizing the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor to make uniform rules and regulations for carrying out the provisions of the act, and section 8, with paragraphs numbered for convenience of reference, are as follows:

> SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform

rules and regulations for carrying out the provisions of this act. * * *

SEC. 8. [1] That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

[2] That for the purposes of this act an article shall also be deemed to be misbranded:

[3] In case of drugs:

[4] First. If it be an imitation of or offered for sale under the name of another article.

[5] Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

[6] In the case of food:

[7] First. If it be an imitation of or offered for sale under the distinctive name of another article.

[8] Second. If it be labeled or branded so as to deceive or mislead the purchaser, or pur-

port to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

[9] Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

[10] Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

[11] First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

[12] Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

THE REGULATION.

Regulation 20 of the Rules and Regulations for the Enforcement of the Food and Drugs Act, promulgated by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, under date of October 17, 1906, and published as Circular 21 of the Office of the Secretary, United States Department of Agriculture, reads as follows:

Regulation 20—Distinctive Name.

(Section 8.)

(*a*) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or com-

pound from any other food product, mixture, or compound.

(*b*) A distinctive name shall not be one representing any single constituent of a mixture or compound.

(*c*) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

(*d*) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

POSITION TAKEN.

In this brief I shall assert that—

I. The phrase "distinctive name of another article," as used in paragraphs 7 and 11 of section 8 of the Food and Drugs Act, means either a name so arbitrary or fanciful as to clearly distinguish the particular food which bears it from all other things, or the name of a kind of food, such as sirup, as differentiated from the names of other kinds of foods, such as flour and meat, which, by common usage, has come to mean a substance clearly distinguishable by the public from every other kind of food.

II. The phrase "their own distinctive names," as used in paragraph 11 of section 8 of the Food and Drugs Act, means names of mixtures or compounds of food which distinguish and particularize such mixtures or compounds from all other foods, even of the same class—that is, in a particular case, a name which belongs exclusively and in its entirety

to one mixture or compound and is not applicable to any other food.

III. The name "Canadian Club Whisky" is not within the meaning of the phrase "their own distinctive names," as that phrase is used in paragraph 11 of section 8 of the Food and Drugs Act, and is therefore not within the exception contained in paragraphs 10 and 11.

IV. Even if the name "Canadian Club Whisky" be within the meaning of the phrase "their own distinctive names," such name does not bring the product within the exception provided in paragraphs 10 and 11, for the reason that the product is "offered for sale under the distinctive name of another article."

V. The law of trade-marks has no application to the question submitted.

VI. The definition of "distinctive name" in Regulation 20 of the Rules and Regulations for the Enforcement of the Food and Drugs Act, while it can add nothing to the law, is reasonable, is within the law, and is entitled to due consideration in the determination of the question submitted.

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I.

THE PHRASE "DISTINCTIVE NAME OF ANOTHER ARTICLE," AS USED IN PARAGRAPHS 7 AND 11 OF SECTION 8 OF THE FOOD AND DRUGS ACT, MEANS EITHER A NAME SO ARBITRARY OR FANCIFUL AS TO CLEARLY DISTINGUISH THE PARTICULAR FOOD WHICH BEARS IT FROM ALL OTHER THINGS, OR THE NAME OF A KIND OF FOOD, SUCH AS SIRUP, AS DIFFERENTIATED FROM OTHER KINDS OF FOODS, SUCH AS FLOUR AND MEAT, WHICH, BY COMMON USAGE, HAS COME TO MEAN A SUBSTANCE CLEARLY DISTINGUISHABLE BY THE PUBLIC FROM EVERY OTHER KIND OF FOOD.

Paragraph 7 of section 8 provides, under the heading "In the case of food," that a food is misbranded "if it be * * * offered for sale under the distinctive name of another article." This plainly means another article *of food*. Articles of food include kinds of food; e. g., meat, flour, sirup, and whisky are articles of food. The names meat, flour, sirup, and whisky are distinctive names of the respective kinds or articles of food when one food is compared with another as in the provisions of paragraph 7. Also, those arbitrary nondescriptive names which, in their entirety, are exclusively applicable to one particular, individual food, and which distinguish that food from all other foods whatsoever, may be said to be distinctive names as contem-

plated by paragraph 7. The word "article" is applied, in common usage, to almost every separate substance or material, whether as a member of a class or kind or as a particular substance or commodity. In speaking of the dictionary definitions of the word "article," Judge Lacombe said, in *Junge* v. *Hedden* (37 Fed., 197, 198):

> The ordinary definition of the word "article" is an extremely comprehensive one. In the primary meaning, as given in the dictionaries, it designates one thing of many, one item of several, a portion of complex whole. [37 Fed., 198.]

This is exactly the sense in which the word is used in paragraph 7. The whole is the entire food supply and an article of the whole is either one of the kinds of food, or a particular food of a given kind or class. In the same case, in error to the Supreme Court (146 U. S., 233, 238), Mr. Chief Justice Fuller, speaking for the court, said:

> In common usage, "article" is applied to almost every separate substance or material, whether as a member of a class or as a particular substance or commodity. [146 U. S., 238.]

The same idea is expressed in *Wetzell* v. *Dinsmore* (4 Daly, 193, 195), where the court said:

> The word *article*, as defined by lexicographers, is "a distinct portion or part, a joint or a part of member, one of various things," etc. It is a word of separation to individualize and distinguish some particular thing from the gen-

> eral thing or whole of which it forms a part, as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise. [4 Daly, 195.]

Applying this definition of the word "article" to that word as used in the phrase "distinctive name of another article," it is plain that paragraph 7 of section 8 includes unmixed foods, and that "distinctive name," within this provision, includes the generic names of kinds of simple, fundamental foods. Whisky, maple sirup, olive oil, coffee, tea, sugar, salt, butter, etc., are distinctive names of articles of food, and one effect of this provision of the act is to prohibit the sale as whisky, butter, etc., of articles which are not entitled to the names.

The soundness of this contention is supported by a well-considered decision of the Supreme Court of the State of New York, Appellate Division, Fourth Department, in the case of *People* v. *Luke* (106 N. Y. Supp., 621, 622). The agricultural law of the State of New York (Laws, 1903, p. 1191, c. 524, sec. 165) defines misbranding, and provides:

> * * * An article of food shall be deemed to be misbranded: First. If it be an imitation of or offered for sale under the distinctive name of another article.

This is the identical language of paragraph 7 of section 8 of the Food and Drugs Act. The question at issue in the case was whether or not the complaint stated facts sufficient to constitute a cause of action. The complaint alleged that a product named and

designated as "Tomato Catsup," labeled "Prepared from whole, ripe tomatoes, no artificial color, and contains one-tenth of one per cent of soda benzoate," was adulterated and misbranded because the same contained benzoate of soda and was artificially colored, and instead of containing one-tenth of 1 per cent of benzoate of soda, contained more than two-tenths of 1 per cent thereof. McLennan, P. J., in delivering the opinion of the court, said:

> The fair meaning of the section is that any article of food is misbranded when it is an imitation of and offered for sale under the name of another article. * * * To illustrate: Oleomargarine is an imitation of butter. If it is branded and sold as "butter," which is the distinctive name of another article of food, the statute, we think, must be held to prohibit the offering for sale of such article of food in such manner. [*People* v. *Luke*, 106 N. Y. Supp., 622.]

The federal courts, in construing the term "distinctive name" in paragraph 7 of section 8 of the Food and Drugs Act, have adopted the construction here contended for, although it does not appear that any cases up to the present time have been contested on this point. For example, in the case of the *United States* v. *420 Sacks of Flour* (Notice of Judgment 382, Food and Drugs Act), the libel alleged misbranding of a mixture of straight and clear flour, branded "Aetna Silk—High Patent," on the ground that the mixture was sold under the distinctive name

of "Patent Flour," and the court, in rendering its decree, found the flour to be misbranded in this:

> (*a*) That it was offered for sale under the distinctive name of another article—that is to say, the said flour was offered for sale as "High Patent Flour," whereas, in truth and in fact, it was inferior to "Patent Flour," and was a mixed flour consisting of "Straight Flour" mixed with "Clear Flour." (Notice of Judgment 382, Food and Drugs Act, p. 46.)

"Patent Flour" is the name of the highest grade of flour, and is a simple or unmixed article of food.

In other cases, allegations have been made, in libels filed under section 10 of the Food and Drugs Act by the United States attorneys, that other mixtures are misbranded because sold under the distinctive name of other articles of food, such as olive oil, sugar vinegar, etc. These cases are not cited here, because it is not apparent from the judgment of the court in any one whether or not this question was in the mind of the court.

The case of the *United States* v. *300 Cases of Mapleine* (Notice of Judgment 163, Food and Drugs Act), tried before the District Court for the Northern District of Illinois, is also instructive on the definition of "distinctive name." The issue was whether or not a product found on analysis to contain no maple product, but labeled "Crescent Mapleine, Crescent Mfg. Co., Seattle, U. S. A.," was misbranded. Sanborn, D. J., in his charge, said;

> Another question which you should take into account is whether "Mapleine" is known,

> or was when these boxes were seized, known as an article of food under its own distinctive name—*and a distinctive name is either one so arbitrary or fanciful as to clearly distinguish it from all other things, or one which by common use has come to mean a substance clearly distinguishable by the public from everything else.* [Notice of Judgment 163, Food and Drugs Act, p. 3.]

It is plain also, as pointed out by Judge Sanborn in this case, that fanciful and arbitrary names for mixtures or compounds of food containing no poisonous or deleterious ingredients, which names serve clearly to distinguish the particular mixtures or compounds from all other foods, are distinctive names within the meaning of paragraph 7. By means of these arbitrary distinctive names the public can distinguish them from all other foods of the same or a different class. A typical example is the breakfast food, formerly on the market, called "Force." The name "Force" distinguished that particular breakfast food from any other breakfast food or from any other food of any kind. It was its "own distinctive name." Assuming that its ingredients were not harmful or deleterious in any way, the consumers received a food product composed of harmless ingredients. The name did not indicate in any way the constituents of the mixture and the use of the distinctive name relieved manufacturers from the necessity of stating the ingredients on the label. It is a fair assumption that, in enacting the provision of the Food and Drugs Act which creates an exception in favor of mixtures and compounds known

"under their own distinctive names," Congress had regard to the fact that there were many foods on the market known to the public by their own peculiar names, and it is probable that the object of Congress was to prevent interference with such articles, provided they were not composed of ingredients which were deleterious or poisonous and were not sold under misleading names. "Zest," "Postum," "Tabasco," "Snowdrift," etc., each standing alone, are distinctive names in this sense.

It is obvious that the phrase "distinctive name of another article," as used in paragraph 7 of section 8 of the Food and Drugs Act, is used in the broadest sense, and, while it may include a distinctive name, such as "Zest" or "Snowdrift," used to differentiate one particular food from all other foods of the same or a different kind, certainly and positively it includes generic names of kinds of food as distinguished from the mass of food. Stating the proposition in other words, it amounts to this: When, by common use, a name has come to mean to the public a certain kind of food, that name is the distinctive name of the article of food. Consequently, a food is misbranded under this paragraph of the law if it be one kind of food and be sold under the distinctive name of another kind of food.

II.

THE PHRASE "THEIR OWN DISTINCTIVE NAMES," AS USED IN PARAGRAPH 11 OF SECTION 8 OF THE FOOD AND DRUGS ACT, MEANS NAMES OF MIXTURES OR COMPOUNDS OF FOOD WHICH DISTINGUISH AND PARTICULARIZE SUCH MIXTURES OR COMPOUNDS FROM ALL OTHER FOODS, EVEN OF THE SAME CLASS—THAT IS, IN A PARTICULAR CASE, A NAME WHICH BELONGS EXCLUSIVELY, AND IN ITS ENTIRETY, TO ONE MIXTURE OR COMPOUND AND IS NOT APPLICABLE TO ANY OTHER FOOD.

Paragraphs 10 and 11 of section 8 provide that a food shall not be deemed to be adulterated or misbranded—

> In the case of mixtures or compounds * * * *known* as articles of food, *under their own distinctive names,* and not an imitation of or offered for sale under the distinctive name of another article.

This exception does not apply to unmixed or fundamental foods, such as meat, flour, butter, etc., but to compounds or mixtures of different articles of food. This fact, it is conceived, has an important bearing upon the question submitted, and will be considered later in this brief.

The attention of the Attorney-General is directed particularly to the words—

> *Their own* distinctive names.

To fall within this exception a mixture or compound

must be known under *its own* distinctive name. In the act the adjective "own" follows the possessive pronoun "their." It is well settled, both on the authority of lexicographers and of courts, English and American, that the word "own" following a possessive pronoun emphasizes the idea of peculiar, exclusive interest, and in its literal and proper sense is limited to the one individual person, article, or thing to which it is applied. That this is the true meaning is apparent from an examination of the dictionaries. The Century Dictionary, edition of 1890, defines the word as follows:

> Own, *a.* Properly or exclusively belonging to one's self or itself; pertaining to or characteristic of the subject, person, or thing; peculiar; proper; exclusive; particular; individual; private; used after a possessive, emphasizing the possession: as, to buy a thing with one's own money; to see a thing with one's own eyes; he was beaten at his own game.

Webster's New International Dictionary, 1910:

> Own, *a.* Belonging to one's self or itself; peculiar; most frequently following a possessive case or pronoun, as my, our, thy, your, his, her, its, their, *in order to emphasize or intensify the idea of property, peculiar interest, or exclusive ownership,* and commonly with reflexive force.

Standard Dictionary, 1907 edition:

> Own, *a.* Belonging to one's self; peculiar; particular; individual; following the posses-

> sive (usually a possessive pronoun) as an intensive to express ownership, interest, or individual peculiarity with emphasis, *or to indicate exclusion of others;* as, my own house; his own idea; it is my own.

The other dictionaries give substantially the same definitions, and it is evident therefrom that the common meaning of the adjective "own," used after a possessive pronoun, is to indicate exclusive ownership, or, as it is phrased in the Standard Dictionary, "to indicate the exclusion of others."

An examination of the cases discloses that in defining the word "own," following a possessive pronoun, the courts are at one with the lexicographers in holding that the combination of words implies peculiar, individual possession in the property or thing to the exclusion of others. In the case of *Rubber Company* v. *Goodyear* (76 U. S., 788), in construing the words "his own establishment" in a license to manufacture under a patent, Mr. Justice Swayne, speaking for the Supreme Court, said:

> This instrument gives to Chaffee, "his executors, administrators, and assigns, a free license to use the said Goodyear's gum-elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, *at his own establishment,* but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; * * *."
>
> There are several objections to the view taken of this license by the counsel for the

> appellant. It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. *It was to be used at his own establishment, and not at one occupied by himself and others.* [76 U. S., 799.]

In *State* v. *John Rhyne* (119 N. C., 905) the Supreme Court of North Carolina was called upon to construe the words "articles of his own manufacture" in a section of the Revenue Act which provided, in effect, that all peddlers should be required to have a license, with the following exception:

> Any person may sell under this section, without payment of tax as peddlers, salt, vegetables, chestnuts, peanuts, fruits, or other products of the farm or dairy, oysters, fish, books, printed music, *or articles of his own manufacture.*

The court said:

> The question before this court is, what is the legal meaning of the words in the above-quoted section, "articles of his own manufacture." We have no hesitancy in declaring that the words mean things made by the person who *actually* does the peddling—not things made by the principal and sold by his agent. The definition of the word "own" in the Century Dictionary is: "Belonging to one's self; peculiar; particular; individual; following the possessive (usually a possessive pronoun) as an intensive to express ownership, interest, or

> individual peculiarity with emphasis, or to indicate the exclusion of others; as my own house, his own idea." So, when the law allows a person to sell articles of his own manufacture, it must refer to ownership in a sense peculiar and intensive as to the owner. [119 N. C., 906, 907.]

Similarly, when the Food and Drugs Act refers to mixtures and compounds known as articles of food, under *their own* distinctive names, it refers to ownership in a sense peculiar and intensive as distinguishing the particular articles of food from all other foods of the same or of a different class.

In the year 1829, in a New York case, *Delonguemare* v. *The Tradesmen's Insurance Company* (2 N. Y. Super. Ct., 629, 674), construing the words "carpenter at work in his own shop," Oakley, J., in his opinion held that a carpenter employed constantly in a china factory to make the racks, shelves, etc., necessary for the proper conducting of the business therein is not to be considered as a "carpenter working in his own shop."

In the well-settled rules of construction of wills, where the words "for his own use," "for her own use and benefit," etc., have frequently called for the decisions of the courts, we find the same principles of construction applied. For example, where a testator gave to his sister, who was intermarried with one Brady, a legacy "for her own use," the use of the phrase "for her own use" was held to be "tantamount to saying not for the use of her husband,

because if it was for his use it could not be for her own use." *Jamison* v. *Brady* (6 Serg. & R., 466, 467.) And in *Heck* v. *Clippenger* (5 Pa. St., 385, 388) the Supreme Court of Pennsylvania held that a bequest to a married woman for her own use is equivalent to a bequest to her for her separate use.

A mixture or compound can not be said to be sold under its own distinctive name unless the name, in its entirety, belongs exclusively to the particular article. The proviso is against the general terms of the statute and is to be strictly construed. In *United States* v. *Dickson* (15 Pet., 141, 165) Mr. Justice Story, in delivering the opinion of the court, said:

> Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof. [15 Pet., 165.]

See also:

Ryan v. *Carter* (93 U. S., 83).

The name must be distinctive in its entirety. A name which is distinctive of a class of simple or unmixed foods can not be converted into a distinctive name of a particular mixture or compound so as to be regarded as its own distinctive name by simply prefixing to the distinctive name of the simple or unmixed food fanciful names arbitrarily selected. Such a construction nullifies the statute. The exception does not apply to the unmixed or fundamental foods, such as meat, butter, flour, whisky, etc., but only to mixtures or compounds of different articles of food, but the distillers in this case have taken the distinctive name of a simple and unmixed food, to wit, whisky, and have prefixed thereto the fanciful designation "Canadian Club," have applied the whole name "Canadian Club Whisky" to a mixture or compound of two different kinds of whisky, and claim by this process to have converted the distinctive name "whisky" into "their own distinctive name." Stripped bare, their assertion is that food manufacturers are at liberty to take any of the common and well-known distinctive names of articles of food, such as oil, to select a fanciful prefix, such as "Italian Club," to apply the whole name "Italian Club Oil" to straight cotton-seed oil or to a mixture of Italian olive oil and cotton-seed oil, under shelter of the exception regarding "their own distinctive names," and thus bar inquiry as to whether the product is misbranded, regardless of the fact that to the consumer Italian oil implies but one thing—namely, olive oil from Italy.

Where a mixture or compound is known as an article of food under a name which contains the generic distinctive name of a simple, unmixed food, such article of food can not be said to be known under its own distinctive name under the Food and Drugs Act. Considering the example above given, namely, Italian Club Oil, it can not be said to be the own distinctive name of the particular oil, because it is a name which does not apply exclusively or peculiarly to the one article and can not be said to be its own. True, part of the name, "Italian Club," is its own, but the word "oil" is generic and belongs to all oils on the market.

In order that a name of a mixture or compound may be said to be its "own distinctive name," the name must, in its entirety, belong exclusively to the particular mixture or compound. If the distinctive name be not exclusive, particular, and individual, it is not its own distinctive name. In other words, the name, to be its "own distinctive name," must distinguish the article to which it is applied from all other articles of food, and no other article of food can be entitled to that name or an essential part of that name. For this reason it is apparent that the only name of a compound or mixture which can be said to be its "own distinctive name" is a name which is not descriptive of ingredients. If it be descriptive of ingredients it can not be the exclusive property of the one mixture or compound, for, to the extent that it is descriptive, it belongs equally to all foods of the same class to which the description

applies. This means practically that for a name of a mixture or compound to be its "own distinctive name," i. e., a name which belongs exclusively to the mixture or compound and distinguishes that mixture or compound from all other food, the name must be an arbitrary, fanciful, nondescriptive name. This interpretation of the phrase is in accord with an opinion of the attorney-general of the State of New York, construing a similar phrase in the New York State food law. This opinion is printed in full in the Congressional Record, Fifty-ninth Congress, first session, vol. 40, pp. 9005–9006. I quote from the opinion:

> The difficult question, at the outset, is to determine the meaning of the exception numbered "first," and this involves an interpretation of the phraseology "their own distinctive names," when read with the rest of the statute.
>
> It is a familiar rule of construction that the intention of the legislature must be ascertained from the whole structure of the act, and that is the rule which must be here applied.
>
> It will be noted that this exception applies not only to mixtures or compounds, which may be known as "articles of food" under their own distinctive names, but also to those which may be so known from time to time hereafter.
>
> It is evident, therefore, that the legislature realized that after the enactment of the law names would be invented for compounds or mixtures which would designate a particular preparation which the public could distinguish by name from any other preparation. It is

likewise to be remembered that the legislature was not referring to fundamental foods, such as milk, beef, fruit, vegetables, etc., but to compounds or mixtures of different articles of food.

It seems to me that the exception, therefore, was intended to apply to compounds or mixtures having arbitrary names of a character which would not, in any way, mislead, but which, by usage, were intended to indicate a food that could be distinctly identified by name in the public mind.

For instance, to coin a word for purposes of illustration, let us assume that "Sahara" was a name used for a powder. Assume that the ingredients of this powder were not harmful or deleterious in any way, and that, by the addition of some water, the powder could be made into a jelly dessert. The word "Sahara" would not deceive any person. It would not indicate the constituent parts of the food and the person purchasing "Sahara" would purchase merely a powder composed of harmless ingredients which could be made into a dessert upon the addition of water in the proportions and in the manner described upon the package. [Cong. Rec., 59th Cong., 1st sess., vol. 40, p. 9005.]

This interpretation of the phrase "known under their own distinctive names" is also supported by the only case so far tried under the Food and Drugs Act, where the significance of the term was squarely in issue. This case is *United States* v. *100 Barrels of Calcium Phosphate* (Notice of Judgment 300, Food and

Drugs Act), tried before the District Court of the United States for the northern district of California. The product there in question was labeled "Provident Chemical Co., St. Louis, 300 pounds, C. A. P." Misbranding was alleged by the Government on the ground that the article was labeled so as to convey the false impression that it was "Calcium Acid Phosphate," when in fact it contained 50 per cent cornstarch. The claimant, on the other hand, asserted in its answer that—

> Ever since the year 1885 said claimant and its predecessors in interest were, and it still is, engaged, at the said city of St. Louis, in the manufacture and production of various kinds and qualities of acid phosphates and other chemicals. Among the chemicals so produced was the substance seized, said substance from about 1884 to 1890 was known and represented as, and sold as, "Cream Acid Phosphate," which substance was known to contain about one-third starch; said name was soon condensed to the arbitrary letters "C. A. P.," which letters were known to represent the said "Cream Acid Phosphate," and became and were known with and applied to this particular product to distinguish it from others and identify it with this claimant as the producer and manufacturer of it. Thereupon said claimant adopted said letters "C. A. P." as its trade-mark and appropriated said trade-mark to chemicals of its manufacture and particularly described the substance seized as the class of chemicals upon which said trade-mark would be and has been used, and the use of said trade-

mark on said substance has been sustained; neither said letters "C. A. P." nor said trademark stand for or are understood by anyone to stand for or represent pure calcium acid phosphate, or any other substance other than said "cream acid phosphate," which is neither a drug nor food, nor used in the composition of food.

The case was heard by the court without a jury, and De Haven, D. J., said:

It is provided in subdivision 4, section 8 of the act of June 30, 1906 (34 Stat., 768), under which this action is prosecuted, that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. * * * It clearly appears from the evidence that the substance referred to in the libel, and sought to be condemned in this action, is compounded of calcium acid phosphate and corn starch, the mixture containing about $33\frac{1}{3}$ per cent of corn starch.

It also appears that the addition of corn starch does not render the mixture deleterious or in any way dangerous to the health of per-

sons eating food in the proportions in which said compound is used.

It further appears that said compound when first manufactured was known as and sold as "Cream Acid Phosphate;" that said name was thereafter condensed to the use of the arbitrary letters "C. A. P." and applied particularly to the substance or product referred to in the libel for the purpose of distinguishing it from other products; that the claimant herein adopted said letters C. A. P. as its trade-mark. In other words, the substance referred to is manufactured and sold under the distinctive name of "C. A. P."

It follows from the foregoing that the plaintiff is not entitled to recover in this proceeding; that while the article sold, under the trade name of "C. A. P.," may be classed as an article of food, it does not contain any poisonous or deleterious ingredients, within the meaning of the statute above quoted, and the libel must therefore be dismissed.

So ordered. [Notice of Judgment 300, Food and Drugs Act, p. 4.]

I think it established that the phrase "their own distinctive names," as used in paragraph 11 of the Food and Drugs Act, means names of food mixtures or compounds which distinguish such mixtures or compounds from all other foods, even of the same class, and that the name of a mixture or compound, which name, in part, is made up of the distinctive name of a simple, unmixed food, can not be said, in speaking of that article, to be its own distinctive name.

III.

THE NAME "CANADIAN CLUB WHISKY" IS NOT WITHIN THE MEANING OF THE PHRASE "THEIR OWN DISTINCTIVE NAMES" AS THAT PHRASE IS USED IN PARAGRAPH 11 OF SECTION 8 OF THE FOOD AND DRUGS ACT, AND IS THEREFORE NOT WITHIN THE EXCEPTION CONTAINED IN PARAGRAPHS 10 AND 11.

It has been demonstrated under the second heading of this brief that the phrase "their own distinctive names," as used in paragraph 11 of section 8, means names which are exclusively applicable to the mixtures and compounds which bear them, and that such names can not be descriptive, because, if descriptive, they lose their exclusive application. The name "Canadian Club Whisky" can not be said to be one of these names. It is composed of the word "whisky," a distinctive name of a simple, unmixed food, to which have been prefixed the arbitrary words "Canadian Club." The whole name is then applied to the mixture sold by the distillers. The words "Canadian Club" mean nothing to the consumer, unless it be true that they convey some idea of ownership. The word "whisky" is the essential part of the name and the part of the name on which the product is sold by the distillers. It is the significant part of the name so far as the Food and Drugs Act is concerned,

because it is the part of the name which indicates the ingredients. This part of the name does not belong exclusively to the particular product; it is the distinctive name of any unmixed potable distillate from grain, colored and flavored in the customary ways, either by the barrel-charring process, where the color and flavor are obtained from the wood, or by the addition of caramel color and flavoring matter. The consumer who buys the mixture known as "Canadian Club Whisky" is plainly deceived unless he be apprised in some way that he is receiving a mixture of the two kinds of whisky, for, as will be pointed out later in this brief, the word "whisky," without qualification, means either one of two kinds of whisky, differentiated by the method of manufacture. The President, in his decision on the meaning of the term "whisky," said:

> The same conclusion is shown to have been in the mind of Congress in 1882, when a question arose in the House of Representatives as between the method of taxation of straight whisky and of that liquor which was the product of continuous distillation. Both were denominated whisky in the discussion. Congress legislated with reference to the distinction between the two in the method of manufacture and preparation for use as a beverage, which was admitted on all sides to exist, but no question was made as to the proper application of the term "whisky" to both kinds of liquor. [Decision of President Taft on What is the Meaning of the Term "Whisky," p. 6.]

The word "Canadian" of itself conveys no impression regarding the ingredients of the product and does not disclose the fact that it is a mixture. The word "Club" or the two words "Canadian Club" together have no more significance or carry no more information than does the name "Club Cocktails," which, in *Heublein* v. *Adams* (125 Fed., 782), was held to indicate merely the origin or ownership of the commercial article to which it was there applied. The name "Canadian Club Whisky," in its entirety, conveys the impression that it is the product of a particular owner, and, contrary to the fact, that the product is an unmixed grain distillate. In this connection the President, in his decision on the meaning of the term "whisky," said:

> A great deal of the liquor sold is a mixture of straight whisky with whisky made from neutral spirits. Now, the question is whether this ought to be regarded as a compound or a blend. The Pure-Food Law provides that "in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends," the term "blend" shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. It seems to me that straight whisky and whisky made from neutral spirits, each with more than $99\frac{1}{2}$ per cent ethyl alcohol and water and with less than half of 1 per cent of fusel oil, are clearly a mixture of like substances, and that while the latter may have and often does have burnt sugar or caramel to

flavor and color it, such coloring and flavoring ingredients may be regarded as for flavoring and coloring only, because the use of burnt sugar to color and flavor spirits as whisky is much older than the coloring and flavoring by the tannin of the charred bark. Therefore where straight whisky and whisky made from neutral spirits are mixed, it is proper to call them a blend of straight whisky and whisky made from neutral spirits. This is also in accord with the decision of the British Royal Commission in the case which I have cited upon a similar issue.

Canadian Club Whisky is a blend of whisky from neutral spirits and of straight whisky aged in the wood, and its owners and vendors are entitled to brand it as such. [Decision of President Taft on What is the Meaning of the Term "Whisky," pp. 7–8.]

It was never the intent of Congress that by means of the exception contained in paragraph 11 of section 8 manufacturers should be permitted to affix arbitrary words to distinctive names of simple foods, and by using these names so composed on compounds and mixtures thus escape the effect of the general provisions of the Food and Drugs Act; nor, it is respectfully submitted, is such the legal effect of paragraph 11. In *People* v. *James Butler, Inc.* (118 N. Y. Supp., 849, 851), it was held that a product labeled "Peerless Extract of Vanilla" was misbranded within the agricultural law of the State of New York, which declares that an article shall be deemed misbranded

where it is an imitation of or offered for sale under the distinctive name of another article and is not a mixture or compound known under its own distinctive name. The product was in fact a mixture of vanillin, coumarin, spirits, sugar, coloring, and water, and the court said:

> There can be no doubt that the label is false and misleading and that the article in question was offered for sale under the distinctive name of another article. Vanilla is an extract of the vanilla bean. A purchaser would think from the label that he was getting that article, not a compound of vanilline, cumerin, spirits, sugar, coloring, and water. A case, then, of misbranding was established, unless the case falls within one of the two exceptions. It does not come within the first, because plainly the article was not a mixture or compound, known under its own distinctive name, and not included under definition first of misbranded articles of food. The defendant contends that this particular article had its own distinctive name, i. e., "Peerless Extract of Vanilla," but it could not escape the charge of misbranding by selecting for a spurious article the name of the genuine article. The case would plainly be included in definition first of misbranded articles. [118 N. Y. Supp., 851.]

"Definition first," referred to in this opinion, provides that an article shall be deemed to be misbranded if it be an imitation of or offered for sale under the distinctive name of another article.

What is the difference between prefixing the words "Canadian Club" to the common name "whisky" and prefixing the word "Peerless" to the common name "extract of vanilla"? I contend that a name which, in itself or in its application to the product which it covers, is misleading or deceptive in any particular can not be said to be a distinctive name within the meaning of the exception in paragraph 11.

The decision of the District Court for the Northern District of Ohio in the case of the *United States* v. *H. Y. Scanlon* (Notice of Judgment 47, Food and Drugs Act) is significant with respect to this contention that a name in itself misleading concerning the ingredients or substances of a food product does not come within the exceptions provided in section 4 of the Food and Drugs Act. The product there in question was labeled "Western Reserve Ohio Blended Maple Syrup," and was found on analysis to consist of a sugar sirup flavored with maple extracted from the wood of maple trees. It does not appear that the question was raised in the case whether the name applied to the product was a distinctive name. It was, however, alleged by the defendant that the product fell within the exception provided by paragraph 12 of section 8 of the act in the case of blends. The court declined to consider whether or not the product was in fact a "blend," but held the product to be misbranded. The court said:

> I pass upon the broad question and lay down the broad proposition that this label is misleading and is a violation of the law. [Notice of Judgment 47, Food and Drugs Act, p. 10.]

The test here laid down, it is submitted, is applicable to the exception provided in the case of products which may be known "under their own distinctive names."

In *United States* v. *300 Cases of Mapleine, supra,* in instructing the jury, Judge Sanborn said:

> Another question which you should take into account is whether "Mapleine" is known, or was when these boxes were seized, as an article of food under its own distinctive name—and a distinctive name is either one so arbitrary or fanciful as to clearly distinguish it from all other things, or one which by common use has come to mean a substance clearly distinguishable by the public from everything else. In this connection, you should consider whether the evidence shows that there was no other article in the market or common or general to the public, used as a maple extract or containing maple product. [Notice of Judgment 163, Food and Drugs Act, p. 3.]

And in instructing the jury further with respect to the provisions of the statute the court said:

> It says the word misbranded shall apply to all articles of food, the label, the package label, of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Now, in determining what the meaning of this word misbranding was, you are to determine two things: Was the label false in any particular? Was it misleading in any particular?

Now, whether or not it was false depends a good deal, you see, upon whether it would mislead anybody, whether it would deceive anybody, because this term "Mapleine," of course, is a coined word, and is not in the dictionary. You heard the testimony as to what meaning was given it by the Crescent Manufacturing Company, but that is not the test. The test is, What is the general signification of the word as the ordinary man would understand it? Was it false in any particular in its true and proper signification? Now, its true and proper signification depends upon what the ordinary man would understand from all the facts and circumstances appearing in the evidence. These two things, while they are separate, are yet connected, because here is a term which starts out without any meaning—I mean any settled or definite or dictionary meaning. The parties who coin the word give it a meaning, and then they send out the label with the word upon it. Now, the question is: Is there anything false in that word, any suggestion of any falsehood in that word, or any suggestion of anything misleading or deceiving in that word? Now, I think it comes down to the question as to what the people would understand by that word from the whole situation, including all the statements on the label, and anything else the purchaser would naturally see. [Notice of Judgment 163, Food and Drugs Act, p. 5.]

The jury in due course returned a verdict of guilty. The charge and the verdict in this case, it is submitted,

are significant as showing the judgment of the court and jury, that a name which in itself is false or misleading regarding the ingredients or substances contained in an article of food is not a distinctive name within the meaning of the exception provided by the statute.

"Canadian Club Whisky" is not a distinctive name within any of these decisions, because it conveys a false and misleading impression regarding the ingredients or substances contained in the product, viz, that the product is one whisky. The consumer naturally supposes that he is getting either a straight whisky or a rectified whisky, whereas, in truth, he is receiving a mixture of both. It may be just as good, but it is not true to name.

IV.

EVEN IF THE NAME "CANADIAN CLUB WHISKY" BE WITHIN THE MEANING OF THE PHRASE "THEIR OWN DISTINCTIVE NAMES," SUCH NAME DOES NOT BRING THE PRODUCT WITHIN THE EXCEPTION PROVIDED IN PARAGRAPHS 10 AND 11, FOR THE REASON THAT THE PRODUCT IS "OFFERED FOR SALE UNDER THE DISTINCTIVE NAME OF ANOTHER ARTICLE."

Attention is directed to the fact that, by the terms of paragraph 11 of section 8, a mixture or a compound, even though it be sold under its own distinctive name, is not included within the exception if it be "*offered for sale under the distinctive name of another article.*" We have already seen that the term "distinctive name" includes the generic names of fundamental unmixed articles of food, of which whisky is one. The mixture produced by these distillers is sold as whisky. It is not whisky, but a mixture of whiskies. It is, therefore, sold under the distinctive name of another article.

For over forty years there have been three kinds of whiskies commonly on the market: (1) The unmixed product of the distillation of grain at comparatively low proof and low temperature, containing a relatively large quantity of fusel oil and aged in wood (Decision of President Taft on What is the Meaning of the Term "Whisky?" pp. 3–4); (2) the unmixed product of the distillation of grain at

high temperature and high proof, containing relatively a small quantity of fusel oil, when reduced to potable strength by the addition of water and colored with caramel (Decision of President Taft on What is the Meaning of the Term "Whisky?" pp. 4–5); (3) a blend of 1 and 2 with or without the addition of harmless coloring and flavoring (Proceedings Before and by Direction of the President Concerning the Meaning of the Term "Whisky," p. 24).

While all of these products are anathema to the prohibitionist, each has its adherents and votaries. Concerning one of the kinds of whisky, aged in the wood, Colonel Ingersoll wrote:

> I send you some of the most wonderful whiskey that ever drove the skeleton from a feast or painted landscapes in the brain of man. It is the mingled souls of wheat and corn. In it you will find the sunshine and the shadow that chased each other over the billowy fields; the breath of June; the carol of the lark; the dews of night; the wealth of summer and autumn's rich content, all golden with imprisoned light. Drink it and you will hear the voices of men and maidens singing the "Harvest Home," mingled with the laughter of children. Drink it and you will feel within your blood the star-lit dawns, the dreamy, tawny dusks of many perfect days. For forty years this liquid joy has been within the happy staves of oak, longing to touch the lips of men. [A Christmas Sermon—The works of Ingersoll, C. P. Farrell, vol. 7, pp. 347–348.]

To the Kentuckian, straight whisky, with its relatively high quantity of fusel oil, is indeed "liquid joy," while in Peoria straight whisky is regarded as a fusel oil abomination. In other parts of the United States the consumers seem to prefer the blend. If it be desired to state the kind of whisky, the common terminology applied to No. 1 is "straight whisky," and to No. 2 "rectified whisky," but the term "whisky," without the use of the term "blend" or "blended," always implies and always has implied an unmixed grain distillate. (Decision of the President on What is the Meaning of the Term "Whisky?" *supra*, and proceedings before the honorable the Solicitor-General on the meaning of the term "whisky.") "Canadian Club Whisky" is a mixture of straight whisky and rectified whisky. At the hearing before the President the following colloquy ensued between the President and Mr. Joseph Choate, attorney then, as now, for the manufacturers of Canadian Club whisky:

> The PRESIDENT. As I understand your statement made originally, your whisky is made by mixing neutral spirits with a straight whisky.
>
> Mr. CHOATE. Ours is made substantially in that way, although those names are not used in Canada, as you understand it. As we understand it here, ours is a blend of two streams, one of what would be called here "straight whisky," and one of neutral spirits. They are run together into the vat. They are then barreled in charred barrels, and remain for five years before they are known as or offered to the trade or marked as "Canadian Club Whisky."

In *People* v. *Luke*, *supra*, in discussing the question of distinctive names, the court said:

> In other words, we conclude that a person who offers an imitation of food for sale under the distinctive name of another article of food is liable under the agricultural law. [106 N. Y. Supp., 623.]

The rule should be the same where the product is a mixture of two widely different articles, such as straight whisky and rectified whisky. The mixture sold as "Canadian Club Whisky" is misbranded under that label and is not subject to the exception provided by paragraph 11, because it is a blend of whiskies and is offered for sale under the distinctive name of whisky. Similarly, mixtures of cotton-seed oil and olive oil, mixtures of cane and maple sirups, and mixtures of chicory and coffee are misbranded if sold, respectively, under the distinctive names of olive oil, maple sirup, and coffee, and this misbranding will not be relieved by prefixing to these names any arbitrary fanciful designations. Neither is it material in this connection that each of the ingredients in the Canadian Club mixture is a whisky and that, in the examples above given, in each case one of the ingredients is not entitled to the name under which the mixture is sold, for, by the terms of the exception in the statute, if the name "Canadian Club Whisky" be a distinctive name, the product is relieved from all inquiry as to whether or not the ingredients contained therein are whiskies. The only question which may be inquired into is whether

the mixture or compound contains any deleterious ingredient.

The deceptive labeling of whiskies received special consideration by the committees of Congress in connection with the pure-food bill. Representative Mann, in presenting to the House the House substitute for the Senate bill, said:

> Another provision which has given rise to considerable controversy, at least out of the House, is the one which affects whisky. We found that there were two antagonistic interests involved in the whisky question. One was those who wished all whisky sold, as far as possible, to be the whisky as it came from the still after being aged; the other was the interest which wished to drive out of business, practically, the pot distilleries, and would require the whisky in the market to be made by so-called "rectification," or other processes, out of ethyl alcohol, pure alcohol, with the addition of coloring or flavoring matter. The committee did not take a decided stand in favor of either of these interests against the other, but leaves each to stand upon its own foundation, upon its own merits, *but requiring that the so-called "rectified" whiskies shall bear upon their label the statement that they are imitation, compounded, or blended, so that the purchaser may know when he buys that class of goods that he is not obtaining whisky as it came from the pot still, simply by aging in barrels or otherwise.* We were asked on one side to adopt an amendment which would have

> put out of business the straight-whisky manufacturers; and we were asked on the other side to adopt an amendment which would have put out of business those who mix or blend the whisky. We did not recommend and have not recommended a proposition upon that point as either side requested, thinking it was not the duty of the committee to recommend to Congress legislation which would determine what people should either eat or drink, but rather to recommend legislation which would permit people to know what they are eating or drinking. [Cong. Rec., 59th Cong., 1st sess., vol. 40, p. 8891.]

And in presenting the conference report on the bill in the form in which it was enacted into law, Mr. Mann said:

> We made a slight change in the amendment which affected the case of whisky, by specifically providing what we thought we had already covered—and still think we had covered—in the House bill—*by specifically providing that in the case of compounded, imitation, and blended articles the package label shall bear the words "compound," "imitation," or "blend."* [Cong. Rec., 59th Cong., 1st sess., vol. 40, p. 9738.]

There can be no doubt that Congress intended in every case that blended whiskies should be plainly labeled so as to indicate that they are blended, in order that the purchasers might be able to distinguish them from unmixed whiskies and might not be deceived by having mixtures sold to them under the distinctive name of whisky. The portion of the

statute by which Congress sought to accomplish this object is paragraphs 10, 11, and 12 of section 8, which are again cited here for the purpose of clearness. They provide:

> [10] Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> [11] First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> [12] Second. *In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That

> nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

These paragraphs, under well-defined rules of construction, must be interpreted, if possible, so as to give effect to their entire context. The rule applicable here is well stated in *Petri* v. *The Commercial National Bank of Chicago* (142 U. S., 644, 650). Fuller, C. J., said:

> The rule that every clause in the statute should have effect and one portion should not be placed in antagonism to another is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the legislature from the words used and the subject-matter to which the statute relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. (*Brewer's Lessee* v. *Blougher*, 14 Pet., 178; *Market Co.* v. *Hoffman*, 101 U. S., 112, 115.) [142 U. S., 650.]

Articles of food, therefore, are adulterated and misbranded unless they fall within one of the two exceptions (*People* v. *James Butler, Inc.*, 118 N. Y. Supp., 849, 851), and paragraph 11, above quoted, should not be construed so as to defeat or weaken the force

of paragraph 12, and it is submitted that if the term "under its own distinctive name" be construed to include the name "Canadian Club Whisky" the effect of paragraph 12, and the general purpose of the act to protect the public from false labeling, will be defeated.

As admitted in the statement of facts, and as the distillers testified at the hearing before the honorable the Solicitor-General, Canadian Club Whisky is a mixture of two separate and distinct distillates of grain, one of which is used for the purpose of giving the desired flavor and contains fusel oil and the other is made with the view of removing the fusel oil and contains no flavor. This mixture is a blend, and, if sold under the name "whisky," must be labeled as a blend or it is misbranded.

V.

THE LAW OF TRADE-MARKS HAS NO APPLICATION TO THE QUESTION SUBMITTED.

In the brief filed by the distillers of "Canadian Club Whisky," before the committee which had under consideration the regulations published as Food Inspection Decision 113, it was contended that the term "distinctive name" has a definite meaning in the law of trade-marks and trade names, and that said meaning should be applied in construing the Food and Drugs Act. It is not doubted that a name must be distinctive in order to be protected as a valid trade-mark, but it does not follow that a name distinctive under the law of trade-marks is a distinctive name within the meaning of the Food and Drugs Act.

In *People* v. *James Butler, supra,* "Peerless Extract of Vanilla" was held to be deceptive when used on a mixture of vanillin, coumarin, etc., and yet in trade-mark law the name is distinctive. Similarly, Judge Sanborn, in *United States* v. *300 Cases of Mapleine, supra,* instructed the jury to consider whether the use of the name "Mapleine," as applied to a product which contained no maple, was a misbranding, and the jury found that the product was misbranded. Yet, "Mapleine" is a distinctive name, pro-

tected as a registered trade-mark. Whether the name is distinctive under the Food and Drugs Act depends, among other things, upon whether it is deceptive, and this depends largely upon the character of the product to which the name is applied. A name which, in its application to a food, is deceptive is not a distinctive name under the Food and Drugs Act. "Peerless Extract of Vanilla" would not be a misbranding if applied to a true extract of vanilla. So, the name "Canadian Club Whisky" applied to a whisky will not be deceptive, but applied to a mixture of whiskies, it is not only a direct misrepresentation that the product is one whisky, but also it amounts to a suppression of the truth. In this sense it is a passive misbranding. In *Stewart* v. *Wyoming Ranche Co.* (128 U. S., 383–390), Mr. Justice Gray, speaking for the court, said:

> In an action of deceit it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a

> false impression upon the mind of the other party, and if this result is accomplished it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. [128 U. S., 388.]

The office of trade-marks and trade names is to point out the true source, origin, or ownership of the goods to which the marks or names are applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. (28 Am. and Eng. Enc., 2d ed., p. 346, and cases cited.) The law applicable to trade names is designed chiefly for the protection of the party entitled thereto. (*Armington* v. *Palmer*, 21 R. I., 109; 42 Atl., 308. *Kentucky Distilleries, etc., Co.* v. *Wathen*, 110 Fed. Rep., 641, 645. 8 Words and Phrases, p. 7042; 28 Am. and Eng. Enc., 2d ed., p. 345.) The protection to purchasers is incidental. The Food and Drugs Act, on the other hand, is designed primarily for the benefit of consumers and has regard to the character and quality of foods and drugs. The act does not prescribe that the name of the owner or proprietor or the place of manufacture shall be declared on labels. If the name of the proprietor or place of manufacture be stated, however, it must be the name of the actual proprietor or the actual place of manufacture, under the general provisions of section 8, whereby it is prescribed that articles are misbranded if the labels contain statements which are false or misleading concern-

ing the article or its ingredients. In cases arising under the law of trade names the issue is one of the proprietorship, ownership, or origin of the particular articles of merchandise. In cases under the Food and Drugs Act, when the articles contain no harmful substances, the issue in general is whether or not the articles and the ingredients and substances contained in the articles are what the names or labels purport. In view of the difference in scope and purpose between this act and the law of trade-marks and trade names, it is submitted there are no canons of statutory construction which demand that a name distinctive under the one must also be distinctive under the other. Furthermore, it is evident, from the terms of the exception, that Congress did not have regard to the names distinctive only within the purview of the law of trade-marks and trade names. Foods are within the scope of the exception if known under their own distinctive names, provided the names be accompanied—

> On the same label, with a statement of the place where said article has been manufactured or produced. [Par. 11, sec. 8, Food and Drugs Act.]

It has been pointed out that a primary purpose of trade-marks and trade names is to distinguish a dealer's place from the business localities of other dealers. If such names *per se* are distinctive within the exception here in question, it is evident that the additional requirement of declaration of the place of manufacture or production serves no purpose. It

is fundamental that a statute should be construed so as to give effect to all its terms, and the clause "their own distinctive names" should not be here interpreted so as to render the declaration of the place of manufacture or production unnecessary and without purpose.

It is pertinent to remark in this connection that it is elementary that no trade name or trade-mark which is applied to deceive will be protected by a court of equity. Under this principle it is at least doubtful whether the name "Canadian Club Whisky," applied to a mixture, without the additional statement that the product is a blend, is entitled to protection as a valid trade name or trade-mark, and it is probably true in a suit for infringement, if the question were raised, the court would decide that the name or mark was not entitled to protection. On this ground alone, under this submission, the question of a distinctive trade name is disposed of.

VI.

THE DEFINITION OF "DISTINCTIVE NAME" IN REGULATION 20 OF THE RULES AND REGULATIONS FOR THE ENFORCEMENT OF THE FOOD AND DRUGS ACT, WHILE IT CAN ADD NOTHING TO THE LAW, IS REASONABLE, IS WITHIN THE LAW, AND IS ENTITLED TO DUE CONSIDERATION IN THE DETERMINATION OF THE QUESTION SUBMITTED.

By section 3 of the Food and Drugs Act, the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor are directed to make uniform rules and regulations for carrying out the provisions of the act. This duty the three Secretaries have performed, and Regulation 20 relates to distinctive names.

Regulation 20 reads as follows:

> (*a*) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.
>
> (*b*) A distinctive name shall not be one representing any single constituent of a mixture or compound.
>
> (*c*) A distinctive name shall not misrepresent any property or quality of a mixture or compound.
>
> (*d*) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

It will be observed that this regulation does not attempt to define "their own distinctive names" as used in paragraph 11. Under the heading (*a*) it defines a "distinctive name" to the extent of saying that such distinctive name must clearly distinguish a food product, mixture, or compound from any other food product, mixture, or compound. This is obviously correct. The other headings of the regulation constitute warnings, but are not by way of definition. Under (*b*) it is provided that a distinctive name shall not be one representing any single constituent of a mixture or compound. This is patent, for if so named, the name would be misleading. Under (*c*) it is provided that a distinctive name shall not misrepresent any property or quality of a mixture or compound. This is correct, because, if any property or quality is misrepresented, the name is deceptive, and we have seen that a name which is deceptive or misleading can not be distinctive. Under (*d*) it is provided that a distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product. This regulation is simply a warning to those who label foods or drugs that no name can, under the law, be regarded as a distinctive name if it be misleading or deceptive. The regulation, so far as it goes, is clearly within the law and is entitled to due consideration in the determination of the question.

Canadian Club Whisky is not a distinctive name within this regulation or within the law, because it does not distinguish the product from any other food

product for the purposes of the Food and Drugs Act. It may distinguish the product in point of origin or ownership, but not in respect to the character or quality of its ingredients. The Food and Drugs Act is concerned with the character and quality of ingredients and not with ownership. Furthermore, the name represents a single constituent of the mixture, namely, whisky, and the name gives a false indication of the character of the product and leads the purchaser to suppose that it is an unmixed product, when, as a matter of fact, it is a blend.

SUMMARY.

It is conceded that if the name "Canadian Club Whisky" is not such a distinctive name under section 8 as to relieve the mixture known as "Canadian Club Whisky" from being labeled as a blend, it is required to be so labeled. The only question, then, to be determined is whether "Canadian Club Whisky," as applied to a mixture of whiskies, is such a distinctive name.

The phrase "distinctive name of another article," as used in paragraphs 7 and 11 of section 8 of the Food and Drugs Act, means either a name so arbitrary or fanciful as to clearly distinguish the particular food which bears it from all other things—e. g., "Force," "Zest," "Snowdrift," etc.—or the name of a kind of food, such as sirup, as differentiated from the names of other kinds of food, such as flour and meat.

The phrase "their own distinctive names," as used in paragraph 11 of section 8 of the Food and Drugs

Act, means names of mixtures or compounds of food which distinguish and particularize such mixtures or compounds from all other foods, even of the same class. By the use of the words "their own distinctive names," Congress indicated that the name was to belong exclusively to the particular mixture or compound. The courts and the dictionaries agree that the word "own," following a possessive pronoun, indicates exclusive ownership.

"Canadian Club Whisky" is not within the meaning of the phrase "their own distinctive names," for various reasons: First, it is composed in part of the name "whisky," a distinctive name of a simple, unmixed food; second, the name "Canadian Club Whisky" is false and misleading as applied to a mixture of whiskies, and on account of the fraudulent use the courts will not protect the name.

The name "Canadian Club Whisky," as applied to a mixture of whiskies, is not within the exception, for the reason that the product is offered for sale under the distinctive name of whisky. The name "whisky," without qualification, means either one of the two kinds of whiskies on the market, but not a mixture of both. To hold the name "Canadian Club Whisky" a distinctive name would nullify the statute and permit all sorts of mixtures and compounds to be sold under the distinctive names of simple or unmixed foods when qualified by arbitrary or fanciful names.

The intent of Congress is plainly shown that all blended whiskies shall be so marked.

The law of trade-marks has no application to the question submitted to the Attorney-General. A name may be a distinctive name in the sense that it is a trade-mark name and yet not be in any sense a distinctive name under the Food and Drugs Act.

The regulation made by the three Secretaries is correct, as far as it goes; it is reasonable, is within the authority given to the three Secretaries by the terms of the statute, and is entitled to due consideration. "Canadian Club Whisky" is not a distinctive name within this regulation.

CONCLUSION.

The name "Canadian Club Whisky," as applied to a mixture of straight whisky with neutral spirits or rectified whisky, is not such a distinctive name under the provisions of section 8, paragraphs 10 and 11, of the Food and Drugs Act of June 30, 1906, as to relieve the mixture from the requirement of being labeled "A Blend of Whiskies" under section 8, paragraph 12, of the same act.

Respectfully submitted.

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